

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ELECTRONIC UNIVERSE, INC., et al.

Petitioners,

v.

SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

SAMUEL REECE,

Real Party in Interest.

B285898

(Los Angeles County
Super. Ct.
No. BC647247)

PURPORTED APPEAL from an order of the Superior Court of Los Angeles County. Treated as a petition for writ of mandate. Susan Bryant-Deason, Judge. Petition granted.

SW Smyth and Andrew Smyth for Petitioners.

No appearance for Respondent.

Samuel Reece, in pro. per., for Real Party in Interest.

Defendant Electronic Universe, Inc. (Electronic), and Electronic's attorney, Andrew Smyth (Smyth) purport to appeal an order directing them to pay monetary sanctions to plaintiff Samuel Reece (Reece) pursuant to Code of Civil Procedure section 128.7.¹

We deem the appeal to be a petition for writ of mandate and grant the relief requested.² Reece was self-represented, and his declaration in support of his motion for sanctions failed to show that he incurred any attorney fees or expenses as a consequence of any conduct by Electronic or Smyth. (§ 128.7, subd. (d).) Therefore, the trial court lacked statutory authority to award Reece any monetary sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

On January 18, 2017, Reece filed suit against two corporations, Electronic and Vermont Sepulveda, Inc. (Vermont) (not a party to this appeal), alleging breach of a confidential settlement agreement between the two corporations and Jane Doe, and that Jane Doe had assigned to Reece "the right to litigate and to recover damages in contract." Reece also alleged that the corporate status of both Electronic and Vermont had been suspended by the Franchise Tax Board.

¹ All unspecified statutory references are to the Code of Civil Procedure.

² As discussed *infra*, the order is not appealable because neither Electronic nor Smyth was ordered to pay sanctions exceeding \$5,000. (§ 904.1, subd. (a)(12).) However, rather than dismissing the appeal, we deem it to be a petition for writ of mandate and resolve the matter on the merits.

On July 25, 2017, the two corporations, represented by Smyth, filed a motion to set aside the default that had been entered against them.

On August 24, 2017, Reece filed a motion seeking sanctions under section 128.7 on the ground that Electronic and Vermont were “suspended corporations that have no right to defend the instant action,” and that the statute authorizes sanctions for the filing of pleadings that lack merit or that are designed to delay the action. Reece’s notice of motion requested an order imposing \$5,000 in sanctions against Electronic, Vermont and their attorney, Smyth, jointly and severally.

In his supporting declaration, Reece asserted a monetary sanction of \$5,000 was warranted “to deter repetition of such conduct by similarly-situated lawyers or law firms.” Reece, who was self-represented, did not assert that he had incurred any attorney fees or expenses as a consequence of the attempt by Electronic and Vermont to defend the action.

In opposition, Smyth argued, *inter alia*, that Reece, as a litigant in *pro per*, was not entitled to an award of attorney fees as sanctions.

On September 19, 2017, the matter came on for hearing. The trial court granted the motion for sanctions, stating a suspended corporation may not defend a lawsuit, both corporations had been suspended, and the filing of an improper pleading by counsel is sanctionable.

Both Electronic and Smyth filed timely notices of appeal from the September 19, 2017 order.³

³ On October 3, 2017, both Electronic and Vermont obtained certificates of revivor, indicating they had been relieved of suspension or forfeiture and were now in good standing with the

CONTENTIONS

Notwithstanding the extensive briefing in this matter, it is only necessary to address the following issues: (1) the appealability of the September 19, 2017 order imposing sanctions; and (2) the provision in section 128.7, subdivision (d), that sanctions may be awarded to a movant only to compensate the movant for “some or all of the reasonable attorney’s fees and other expenses incurred as a direct result of the violation.”⁴

DISCUSSION

1. *Appealability.*

“A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment.” (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.) Section 904.1, subdivision (a)(12), provides that an appeal may be taken “[f]rom an order directing payment of monetary sanctions by a party or an attorney for a party if the amount *exceeds* five thousand dollars (\$5,000).” (*Italics added.*) Sanctions “orders or judgments of five thousand dollars (\$5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.” (§ 904.1, subd. (b).)

Franchise Tax Board. The revival of corporate powers, even after notice of appeal was filed, entitles an appellant to proceed with its appeal. (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 373-374; *Bourhis v. Lord* (2013) 56 Cal.4th 320, 323.)

⁴ We requested supplemental briefing on these issues.

The threshold issue presented is whether either appellant, Electronic or Smyth, was ordered to pay sanctions in an amount exceeding \$5,000 so as to give rise to an appealable order. (§ 904.1, subd. (a)(12).)

Reece's notice of motion for sanctions pursuant to section 128.7 requested an order imposing sanctions against defendants Electronic and Vermont, as well as their attorney, Smyth, "jointly and severally, in the sum of Five Thousand Dollars (\$5,000)." The September 19, 2017 minute order, which is the subject of this appeal, simply stated the motion was "granted," without specifying an amount. Viewing the trial court's ruling in light of Reece's motion, it appears that pursuant to the trial court's order, appellants Electronic and Smyth were to be jointly and severally liable to pay the sum of \$5,000 to Reece. Consequently, neither appellant was directed to pay sanctions in an amount *exceeding* \$5,000.

Reece has taken the position that the trial court's order requires Vermont, Electronic and Smyth each to pay him \$5,000, for a total of \$15,000. Reece also has inaccurately claimed, in correspondence to the State Bar, that Smyth and his clients were sanctioned in the sum of \$15,000, jointly and severally. Reece's construction of the sanctions order is belied by the record; as indicated, his motion sought sanctions in the sum of \$5,000 against the two corporate defendants and their counsel, jointly and severally, and that is the motion that the trial court granted. However, even assuming the trial court's order requires *each* of the three sanctioned parties to pay Reece \$5,000, there still is no order directing any party or an attorney for a party to pay sanctions in an amount *exceeding* \$5,000, which is the threshold for appealability under section 904.1, subdivision (a)(12).

Nonetheless, this court has discretion to treat the purported appeal from the September 19, 2017 order as a petition for writ of mandate (§ 904.1, subd. (b)), and we do so here. The appeal has been pending since October 2017, and the matter has been fully briefed. All the parties desire a resolution of the merits—the two appellants’ opening briefs as well as Reece’s respondent’s brief have taken the position that appellate jurisdiction exists. Dismissal at this late stage, which would require appellants to await an appeal from the final judgment to obtain review of the sanctions order, would be unnecessarily dilatory and circuitous. Further, the improper award of \$5,000 in sanctions is highly prejudicial to appellant Smyth because the imposition of \$1,000 or more in judicial sanctions must be reported to the State Bar. (Bus. & Prof. Code, § 6068, subd. (o)(3).) Accordingly, we shall decide this case on the merits.

2. *Trial court erred in awarding monetary sanctions to Reece because he failed to show that he incurred any attorney fees or expenses.*

Reece moved for monetary sanctions pursuant to section 128.7, subdivision (d), which states in relevant part that “the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, *an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.*” (Italics added.) Thus, the statute authorizes the trial court to direct payment to the movant of monetary sanctions only to compensate the movant for attorney fees and other expenses. (See generally, Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2018) § 9:1215 et seq.)

Reece, who was self-represented, did not show that he incurred any attorney fees or other expenses. Reece's moving declaration merely requested "a monetary sanction of \$5,000 . . . to deter repetition of such conduct[.]" Due to Reece's failure to establish that he incurred any attorney fees or other expenses (§ 128.7, subd. (d)), the trial court lacked statutory authority to award Reece monetary sanctions in any amount. (See also *Trope v. Katz* (1995) 11 Cal.4th 274, 285-286 [nonattorney pro se litigant cannot recover compensation for time he expends in litigating his case in propria persona]; *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520 [attorney who responds in pro se to a filing abuse may not recover sanctions under section 128.7 in the form of an award of attorney fees].)⁵

⁵ In his supplemental brief, Reece argues the order imposing sanctions should be affirmed if correct on any theory, and that the sanctions can be justified as a penalty to the court. (§ 128.7, subd. (d).) The argument is meritless because the trial court ordered sanctions payable to Reece, not to the court, and as discussed, Reece did not incur any expenses or attorney fees.

DISPOSITION

Let a peremptory writ of mandate issue, directing respondent superior court to vacate its September 19, 2017 order granting Reece's motion for sanctions against Electronic and Smyth under section 128.7, and to enter a new and different order denying Reece's motion as to Electronic and Smyth. Reece's motion for appellate sanctions (motion filed October 9, 2018) is denied. Electronic and Smyth shall recover their costs in this proceeding. (Cal. Rules of Court, rule 8.493.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.